Drawing Lines in the Sea

STRAIGHT BASELINES IN INTERNATIONAL MARITIME BOUNDARY DELIMITATION. *By* W. Michael Reisman and Gayl S. Westerman. New York: St. Martin's Press, 1992. Pp. xvi, 242.

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Few natural scientists or social scientists question the importance of baselines. Baselines are a point of departure, a reference with respect to which we determine what has happened for descriptive purposes, what is likely to happen for predictive purposes, and what is permitted to happen for normative purposes. The normative importance of baselines is particularly apparent in the law. The effect of the most determinate rule can be rendered uncertain if its application is dependent upon a baseline that is itself uncertain. Statutes of limitation are one example.[1]

So it is with the law of the sea. Vast and varied zones of coastal state jurisdiction are subject to precise maximum limits, expressed in nautical miles. These limits are measured seaward from baselines along the coast. Waters landward of baselines have a status different from those immediately seaward. Thus, the rules regarding the establishment of baselines by coastal states are important to the coastal state as well as to other states with interests in the use and regulation of the broad areas affected. Notwithstanding these considerations, the subject of coastal baselines is often considered an arcane subset of international law. This book addresses only one type of baseline.[2] It is likely to invite attention only from those who are otherwise interested in this particular field. That is a pity.

The authors take the reader on a journey from the observation that the rules on straight baselines, even if written as positive law, are subject to substantial abuse under a unilateral interpretation regime;[3] to the observation that the traditional reliance in international law on resistance by individual states to excessive claims does not seem to work well in this area, in part

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1. What could be more determinate than a rule that an action may not be brought after two calendar years? But this determinacy in fact depends on the determinacy of the baseline, that is, on a clear understanding of when one starts counting. In some situations, there may be substantial uncertainty about either the content or the application of the rules about when one starts counting.

2. It follows a book by one of the authors dealing with waters enclosed by another type of baseline, juridical bays. *See* GAYL S. WESTERMAN, THE JURIDICAL BAY (1987). Indeed, in the present work the authors complain that some states are using straight baselines improperly as a means of superseding or ignoring the limitations regarding closing lines across juridical bays. *See generally* W. MICHAEL REISMAN & GAYL S. WESTERMAN, STRAIGHT BASELINES IN INTERNATIONAL MARITIME BOUNDARY DELIMITATION 102, 136-51 (1992). Experts in contract law might make similar observations about the potential "circumventions" of contract norms associated with unjust enrichment, promissory estoppel, or affirmative duty in tort.

3. REISMAN & WESTERMAN, *supra* note 2, at 118-90.

because it is a manifestation of the tragedy of the commons;[4] to the effort to find alternative international institutional mechanisms for asserting the community interest in resisting excessive claims;[5] to the recognition in this regard that authoritative judicial and arbitral tribunals can play a significant role in dealing with this problem.[6] As such, this book confronts not just the problem of straight baselines. It confronts the problem of the law of the sea in the twentieth century.

This book is unquestionably a scholarly, analytical policy resource for those who are, or wish to become, well-informed about baselines. It contains an informative historical analysis of the origin of straight baselines,[7] an extensive textual analysis of the articulated criteria for such baselines,[8] a coherent policy foundation that informs its elaborate interpretive exercise,[9] an examination with helpful charts and illustrations of a variety of straight baseline claims and "pathologies,"[10] and a set of interesting policy recommendations.[11]

I. SIX AUDIENCES FOR *STRAIGHT BASELINES*

The authors conclude that much of current baseline practice is anachronistic. One may test this conclusion by disaggregating the parties potentially concerned with baselines into sub-groups. Six potential audiences for this book emerge. When their interests are examined, the limited utility of the present baseline regime becomes clear.

The first potential audience is comprised of neighboring coastal states with maritime boundary disputes. These states frequently ignore straight baselines when negotiating their maritime boundaries.[12] Similarly, international

4. *Id.* at 202.
5. *Id.* at 206-16, 222-30.
6. *Id.* at 216-22.
7. *Id.* at 19-70.
8. *Id.* at 71-104.
9. *Id.* at 1-37.
10. *Id.* at 105-90. The authors define "pathological" baseline claims as those that violate the geographic requirements of Article 4 of the 1958 Convention on the Territorial Sea and Contiguous Zone and Article 7 of the 1982 Law of the Sea Convention. *Id.* at 118-20. *See* Convention on the Territorial Sea and the Contiguous Zone, *done on* Apr. 29, 1958, art. 4, 15 U.S.T. 1606, 1608, 516 U.N.T.S. 205, 208 (entered into force Sept. 10, 1964); United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 7, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 (1982) [hereinafter LOS Convention].
11. *Id.* at 191-230.
12. *See* Louis B. Sohn, *Baseline Considerations*, *in* INTERNATIONAL MARITIME BOUNDARIES 153 (Jonathan I. Charney & Lewis M. Alexander eds., 1993). This study, sponsored by the American Society of International Law, was released some time after publication of the book being reviewed. Where only one of the parties has drawn straight baselines or the particular straight baselines drawn by one of the parties might otherwise distort the location of a boundary measured from the respective "coasts" of the parties, the tendency is either to ignore the straight baselines or, like Cuba and the United States, to consider what effect the hypothetical establishment of similar straight baselines by both parties would have. *See* Robert W. Smith, *Cuba-United States (Rep. 1-4)*, *in* INTERNATIONAL MARITIME BOUNDARIES, *supra*, at 417, 419. For an overview of the relationship between baselines and maritime boundary delimitation, see generally INTERNATIONAL MARITIME BOUNDARIES, *supra*.

tribunals charged with delimiting such maritime boundaries also tend to ignore straight baselines.[13] This has important implications. If one reason to use straight baselines aggressively is to push a maritime boundary toward the coast of a neighboring state, the ploy is unlikely to work. Indeed, it could well be counter-productive. Conservative straight baselines conforming to criteria such as those favored by the authors might survive scrutiny in negotiations or litigation despite some modest effects on the maritime boundary favorable to the claimant. On the other hand, aggressive and arguably unreasonable straight baselines are likely to be "compensated" for or ignored. This is either because one party or the tribunal prefers to avoid addressing the legality of the baselines or, as the authors note, because the effect of establishing a maritime boundary measured from the claimed baselines would be inconsistent with the legal requirement of an equitable result. Worse still for the claimant state, the desire to avoid dealing with or giving effect to the baselines could encourage the negotiators or judges to prefer a method of delimitation other than equidistance, thus undermining not only the tactics but also the presumed strategy of the claimant state.

A second audience is comprised of parties concerned with jurisdiction over marine fisheries. Straight baselines originated in attempts to expand coastal state fisheries jurisdiction.[14] As the authors note, however, the subsequent emergence of broad coastal state jurisdiction over fisheries in a 200-mile exclusive economic zone[15] has diminished the utility of straight baselines in this regard.

In many parts of the world, discrete commercial fishery populations spend their entire life cycles within 200 miles of the coast, and thus within the territorial seas and exclusive economic zones of one or more coastal states. Therefore, changes in the location of coastal baselines normally would not affect interests in such fisheries.[16] Other discrete populations migrate over such great distances both within and outside coastal state jurisdiction that the differences between a conservative or liberal approach to straight baselines also would have little practical effect. Examples include valuable fisheries for tuna[17] and salmon.[18] Jurisdiction over valuable sedentary creatures of the

13. REISMAN & WESTERMAN, *supra* note 2, at 95-97.

14. Indeed, the case that largely legitimated the use of straight baselines involved baselines established for fisheries jurisdiction purposes. Fisheries Jurisdiction (U.K. v. Nor.), 1951 I.C.J. 116.

15. The exclusive economic zone is an area beyond and adjacent to the territorial sea, in which the coastal state has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or nonliving, of the waters superajacent to the sea-bed and the seabed and its subsoil." LOS Convention, *supra* note 10, art. 56. *See also id.* arts. 55, 57, 61-73. Reference to "miles" in this review means nautical miles.

16. As a textual matter, the coastal state's duties to maintain an optimum sustainable yield and permit optimum utilization of fisheries stocks are referred to only with respect to the exclusive economic zone, not the territorial sea or internal waters. LOS Convention, *supra* note 10, arts. 61-62. As a practical matter, manipulation of the territorial sea limit through baselines is unlikely to have a significant effect in this regard.

17. Straight baselines might have some minor effects on regional management systems that allocate quotas or revenues based on the temporal or spatial presence of tuna stocks in waters subject to the jurisdiction of each participating state.

continental shelf such as king crab is also unlikely to be affected by the precise location of coastal baselines because the areas where they are found, even if seaward of 200 miles, are likely to be subject to the coastal state jurisdiction over the seabed of the continental shelf.

What remain are so-called "straddling stocks" that spend their lives both within 200 miles of the coast and in classic high seas areas outside, but generally adjacent to, the 200-mile limit. Foreign fishing for such stocks beyond the 200-mile limit has aroused considerable resentment in nearby coastal states concerned about both allocation and conservation. This problem is significant only in certain extensive fishing grounds off the coasts of a few states, such as Argentina and Canada in the Atlantic Ocean, and Russia and the United States in the Bering Sea. "Pathological" straight baseline claims might have some limited effect on straddling stocks in some of these areas. In general, however, such "pathological" claims would not solve the problem for the claimant state because they would not push the outer limit of the exclusive economic zone far enough to embrace the full migratory range of the stocks.[19] Overall, therefore, the baseline issue is not central to the concerns of those interested in jurisdiction over commercial marine fisheries.

A third potential audience is comprised of parties concerned with the resources of the "international seabed area" beyond the limits of coastal state jurisdiction over resources of the continental shelf. In areas where the geographic continental margin does not extend beyond 200 miles, the outer limit of the continental shelf, and hence the landward limit of the international seabed area, is a line 200 miles from the coastal baseline.[20] Where the continental margin extends beyond 200 miles, coastal state jurisdiction over the continental shelf in principle embraces the continental margin, but may stop short of the outer edge of the continental margin if that outer edge is further seaward than specified geographic limits, one of which is a distance of 350 miles from the coastal baseline.[21] Generally the more seaward the coastal baseline, the more seaward are the lines measured from the baseline and the smaller the remaining international seabed area beyond.

The 1982 U. N. Convention on the Law of the Sea declares the international seabed area to be the common heritage of mankind, and envisages the establishment of an International Seabed Authority to administer mining there

18. In the case of salmon, straight baselines might have some subtle effects in theory, but these are not likely to make a practical difference. The issue turns in part on whether the state of origin, the state that enjoys primary regulatory interest over salmon, is only the state in whose streams salmon spawn or through whose rivers they travel, or, more broadly, the state through whose internal waters the salmon travel. If "state of origin" refers to the latter, the use of straight baselines, which create internal waters, could have an impact on jurisdiction over salmon. Interestingly, since fishing for salmon on the high seas beyond exclusive economic zones is generally prohibited except for certain traditional fisheries, any expansion of the outer limit of economic zones resulting from the use of baselines *decreases* the size of the prohibited area. *See* LOS Convention, *supra* note 10, art. 66.

19. Nevertheless, governments still may try to draw aggressive straight baselines in an attempt to demonstrate to their constituencies that they are doing something about fisheries. Bold but ineffective responses to constituent pressure can be useful in politics and diplomacy.

20. LOS Convention, *supra* note 10, arts. 57, 76.

21. *Id.* art. 76.

for the benefit of all humanity.[22] Plausibly enough, the authors of this book point out that those interested in maximizing the community interest in this common heritage should support a conservative approach to coastal baselines.[23]

Why has this not occurred? Arguably because straight baselines have too indirect an effect on the size of the international seabed area. But the champions of the common heritage idea show the same lack of interest in claims that have a more direct and obvious effect on the size of the international area, such as the expansive misreading of the definition of the continental shelf by Chile and Ecuador.[24] The authors' observation that "here one encounters another dimension of the tragedy of the commons"[25] is unquestionably an important part of the answer. However, with respect to the international seabed area, there may be other important factors involved.

One apparent purpose of the United States' highly internationalist approach to the seabed in its 1970 proposals[26] was to create a broad international constituency for resisting encroachments on the commons by coastal states. The United States hoped to achieve this goal by creating an international economic and institutional interest in continental margin resources seaward of the narrowest arguable "vested" limit of the continental shelf under the 1958 Convention, namely the 200-meter isobath.[27] However, certain Latin American states were interested in broad areas of exclusive coastal state jurisdiction. To advance this goal they stimulated developing country interest in an elaborate and powerful institutional framework to govern the international area that was unpalatable to industrial states. Not only did this direct attention away from the issue of limits, but it led industrial states to conclude that a smaller international area — particularly one devoid of significant hydrocarbon potential — was a good idea, and that giving the proposed International Seabed Authority any role in connection with continental margin resources was a bad idea.

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22. *Id.* part XI.

23. Under the 1982 Law of the Sea Convention, even in areas where the continental margin extends beyond 200 miles, the effect of aggressive use of straight baselines is to reduce the size of the area of the continental margin beyond 200 miles that, although not part of the international seabed area, is nevertheless subject to some international revenue-sharing obligations. LOS Convention, *supra* note 10, art. 82. Industrial states that have difficulty with the deep seabed mining regime set forth in the Convention generally maintain that all states and their nationals have the right to explore and exploit minerals of the international seabed area pursuant to high seas principles. To protect that interest, they, too, presumably should support a conservative approach to the question of the maximum seaward extent of coastal baselines.

24. Declaration by Chile, Sept. 12, 1985, *reprinted in* UNITED NATIONS, LAW OF THE SEA BULLETIN 107 (1985); Proclamation by Ecuador, Sept. 19, 1985, *reprinted in id.* at 109.

25. REISMAN & WESTERMAN, *supra* note 2, at 202.

26. *See United States: Draft United Nations Convention on the International Sea-Bed Area*, U.N. GAOR, 25th Sess., Supp. No. 21, at 130, U.N. Doc. A/8021 (1970).

27. Convention on the Continental Shelf, *done on* Apr. 29, 1958, art. 1, 15 U.S.T. 471, 473, 499 U.N.T.S. 311, 312 (entered into force June 10, 1964).

The result was a shift in focus from the relative size and wealth[28] of the international area to the nature of the regime and institutions designed to govern the exploitation of the hard mineral resources that remained beyond coastal state jurisdiction. Once the negotiators recognized that the net present value of seabed wealth beyond coastal state jurisdiction was not likely to be significant, they felt relatively free to convert the negotiations into an exercise about abstractions of political economy. To this day, the interest in and controversy about the international seabed area concerns the nature of the regime and institutions, not the nature or extent of the area and its resources. As a result, the international seabed debate is unlikely to stimulate much if any interest in the issue of baselines.

A fourth potential audience is comprised of those interested in preserving or restricting freedom of communication and transportation by navigation, overflight, cable, and pipeline. The freedoms of navigation, overflight, and related activities begin at the outer limit of the territorial sea. The 1982 Law of the Sea Convention specifies that territorial seas may not exceed twelve miles from coastal baselines.[29] Since communication by sea is of vital significance to the economic and security interests of all states, one should conclude that the interests of most if not all states are best served by actively opposing "pathological" baseline claims. Why have so many failed to do so?

The rules set forth in the 1982 Law of the Sea Convention circumscribe the impact of the straight baseline regime and, therefore, provide a partial explanation as to why states interested in communication and transportation do not more actively oppose "pathological" baseline claims. While freedom of the seas ends at the 12-mile line, three important "easements" extend landward of that line: (1) a suspendable right of innocent passage for ships on the surface within the territorial sea, within archipelagic waters, and within those waters enclosed by a system of straight baselines that were not previously regarded as internal waters;[30] (2) a liberal non-suspendable right of archipelagic sea lanes passage for ships and aircraft transiting archipelagic waters;[31] and (3) a liberal non-suspendable right of transit passage for ships and aircraft traversing straits overlapped either by territorial seas or by waters enclosed by a system of straight baselines that were not previously regarded as internal waters.[32] These "easements," especially the latter two, sharply limit the practical impact of straight baseline claims on the transit of ships and aircraft.[33]

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28. Size and wealth should not be confused. In economic terms, the present value of the seabed of the Persian Gulf might well exceed that of much if not all of the international seabed area.

29. LOS Convention, *supra* note 10, art. 3.

30. *Id.* arts. 8(2), 17, 20, 52.

31. *Id.* arts. 44, 53, 54.

32. *Id.* arts. 35(a), 37, 38, 44. For example, this "easement" applies to the waters enclosed by straight baselines off the coast of Oman in the Strait of Hormuz at the entrance to the Persian Gulf.

33. The dynamic relationship between a liberal transit regime and a liberal baseline regime is particularly evident in the provisions of the 1982 Convention regarding archipelagic waters. While the criteria for archipelagic baselines (analogous to straight baselines) are very liberal, so is the regime for archipelagic sea lanes passage. *Id.* arts. 47, 51, 53-54.

The authors' comments about the "tragedy of the commons" are also particularly apt in this context:

> If the matters in question are perceived as only relatively minor inconveniences by each *individual* member of a community, though they may have the most inclusive impacts and cumulatively portend major effects for *all* members of that community, each individual member will more than likely calculate that it is not worth its while to react.[34]

This idea bears repetition as an explanation for the failure of governments to take more forceful action to protect navigation and other inclusive interests at sea not only from aggressive straight baseline claims but from coastal state encroachments in general.

Furthermore, governments may discount the precedential value of "pathological" baseline claims and, therefore, underestimate the deleterious effects of curtailing freedom of communication and transportation. Both the legal permissibility and the practical effect of baseline claims by any given state can be assessed only with reference to the particular geography and uses of the precise area in question. Even for those alert to problems of precedent, the precedential effect of a claim rarely is evident without detailed knowledge of the geography of the area in which the claim is made and of comparable, or arguably comparable, coastal areas elsewhere. While it is easy to explain to a high government official that a 25-mile territorial sea claim breaches a rule specifying a 12-mile limit, it is more difficult to explain the implications of a number of the "pathological" baseline claims identified by the authors.[35]

In terms of current interests in ocean uses, then, it does not appear that either interests in the living and non-living resources of the sea and seabed, which are not significantly affected by straight baselines, or interests in the communications uses of the sea, which are significantly affected but in sometimes subtle ways, will generate broad support for or broad opposition to the authors' views. Most states give priority to their coastal resource interests in considering law of the sea issues, and coastal baselines are increasingly resource neutral in that context. Those concerned with the living and non-living resources of the sea look to superseding legal norms, making the straight baseline regime less and less relevant to their concerns. For example, any concerns that the fishing community had with the interpretation of the straight baseline regime have been superseded by the emergence of the exclusive economic zone. Those interested in the international seabed have shifted attention from the extent of national jurisdiction over the seabed to the institutional framework to govern the common seabed areas.

Who then is concerned about the effects of straight baselines? A fifth potential segment of this book's audience consists of those who are concerned with the *domestic* effects of baselines. In certain federal states like the United States, state or provincial jurisdiction over offshore areas stops well short of

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34. REISMAN & WESTERMAN, *supra* note 2, at 202.

35. Those who have faced such difficulties are likely to sympathize with the authors' attempt to introduce reasonably determinate numerical factors into the legal calculus, such as a criterion that baselines may not extend more than twelve miles from *terra firma*. *Id.* at 89.

the areas claimed by the national government, for example at the coastal baseline or at a line relatively close to shore measured from the baseline.[36] In effect, the international law of baselines is appropriated for purposes of allocation of domestic competence. While the domestic law audience will find much of interest in the analysis of the international law of straight baselines,[37] the domestic law consequences of straight baselines are not addressed in this book.

A sixth group, the traditional international law of the sea mavens, will likely constitute this book's primary audience. These are people who, like the authors, understand that the struggle between the *mare liberum* of Grotius and the *mare clausum* of Selden continues, and that straight baseline law is one theater of battle.[38] These are also people who may care about the outcome. For example, even if those interested in preservation of the navigational uses of the sea look with more concern to the "easements" embodied in the 1982 Convention than to the straight baseline regime, naval uses of the sea are not limited to passage and transit rights protected by these "easements." But do, or more importantly should, the people who care share the authors' conclusions that straight baseline law is an anachronism and that the rules permitting straight baselines should be construed as narrowly as possible?

The authors make a compelling argument for the proposition that the rules permitting the establishment of straight baselines are anachronistic. One intriguing question is whether there is a broader anachronism inherent in reliance on geographic limits as the exclusive, or even principal, vehicle for preserving freedom of navigation and other inclusive uses of the sea in an era in which balancing overlapping rights can be more important than drawing boundary lines. For example, the principal significance of the 200-mile seaward limit of the exclusive economic zone is its symbolic representation of the stability of the law of the sea regime set forth in the 1982 Convention and its use as a limit on coastal state jurisdiction over stocks of fish that migrate within and beyond 200 miles of the coast. Notwithstanding certain coastal state rights with respect to pollution from ships within the zone, the principal importance of the exclusive economic zone with respect to navigation, overflight, and related inclusive uses is not its seaward limit but the combination of its landward limit (the 12-mile maximum limit of the territorial sea) and the balance of the substantive regime of the exclusive economic zone. The landward limit largely determines the area where freedom of communication begins in principle. The substance of the economic zone regime determines the relative priority to be given these inclusive uses as

36. *See, e.g.*, Submerged Lands Act, 43 U.S.C. § 1302 (1992).

37. One might note that in federal states that use the coastal baseline for allocation of domestic competence between state and national governments, officials of the federal treasury and other federal ministries are likely to welcome the authors' interpretive and policy approaches. Officials seeking to maximize local control over areas such as those off the Aleutian Islands, the Florida Keys, or the Hawaiian Islands might not share that enthusiasm.

38. DAVID M. WALKER, THE OXFORD COMPANION TO LAW 805 (1980).

compared with the exclusive uses and regulatory powers accorded the coastal state in precisely the same broad area.

The problem identified by the authors of enforcing a rational international policy with respect to straight baselines in fact affects many other rules regarding coastal state powers over navigation and related uses. If it is hard to explain and resist particular excessive straight baseline claims, it is equally hard to ascertain, explain, and resist each aggressive interpretation of the balance between coastal state rights and navigational and other inclusive freedoms in areas such as the exclusive economic zone. Therefore, states should be sensitive to the search for solutions to the problem of aggressive baseline claims, if only because these solutions are potentially applicable to other problems as well.

II. SOLUTIONS

The authors link the deficiencies in current baseline policy to the proliferation of "pathological" claims. In essence, the authors identify a collective action problem. The authors' proposed solutions to the community enforcement problems therefore should appeal not only to international law of the sea mavens, but also to any audience that is concerned with resolving collective action problems as they arise in the international community.

The authors believe that neither the U.N. General Assembly nor another Law of the Sea Conference is likely to deal with the baselines problem effectively, and that turning to either to solve this problem could be counter-productive.[39] They suggest instead that other global organizations reflecting sectoral interests, such as the International Maritime Organization, or regional organizations whose members have substantial direct navigation and related interests, such as OECD and NATO, should address these issues.[40]

The authors also argue that the principle of "a predictable international dispute resolution regime governing maritime law" should be accepted by "all member states."[41] The availability of arbitration or adjudication may spell the difference between mere verbal protest and potentially effective action. It may also discourage governments from making excessive claims to begin with. This solution, however, raises at least three questions: (1) What is the relevant "maritime law"? (2) Which states must participate in order to make a dispute resolution regime effective? and (3) How would acceptance of such a regime be achieved? The answers to these questions are not explicitly set forth in this book, although some may be suggested by analyzing the authors' policy observations

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39. REISMAN & WESTERMAN, *supra* note 2, at 199-201.

40. *Id.* at 212. The fact that there is little in the record to suggest governments' willingness to engage these organizations in such an effort does not necessarily mean it could not be done, although the record is not encouraging.

41. *Id.* at 227. As one of the drafters of a statement that the authors cite in support of the proposition that third-party dispute settlement could be a useful tool in restraining excessive coastal state claims, this writer naturally applauds that argument. *See id.* at 227 & n.93.

The book as a whole proceeds on the implicit assumption that the relevant law is contained in the provisions of the 1982 U.N. Convention on the Law of the Sea, although it makes no explicit attempt in this regard to distinguish between customary and conventional law.[42] If the object is stability and predictability,[43] however, the relevant source of law must be the Convention, lest the process of adjudication itself create a series of chaotic distinctions between rules applicable to Convention parties *inter sese* upon entry into force and those applicable under customary law. Adjudication or arbitration under customary international law principles divorced from the Convention text cannot be relied upon to yield clear articulations of applicable straight baseline rules.[44] By contrast, the authors seem to view the Convention as a reasonably coherent and integrated source of policy that is better suited to guide judges and arbitrators to clearer choices in the articulation and application of straight baseline rules.

A dispute resolution regime might be achieved by convincing states to arbitrate after disputes have arisen. However, relying on post-dispute agreements to arbitrate is unlikely to create "a predictable international dispute resolution regime." According to the authors the purpose of such a regime is not dispute settlement alone, but rather the articulation and strengthening of legal guidelines.[45] These objectives would best be achieved by advance acceptance of arbitral or judicial jurisdiction with respect to matters such as straight baselines by most if not all coastal states. Unfortunately, obtaining such advance consent to compulsory jurisdiction is notoriously difficult.

It is therefore extremely important that the 1982 Law of the Sea Convention provides for compulsory arbitration of most relevant disputes.[46] Although the fact that alternative fora are available is of some concern to the authors,[47] this should not obscure the core fact that all parties to the

42. It thus presumably declines the controversial invitation of the International Court of Justice to distinguish between the two even when the same norm is involved. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27), para. 178.

43. The authors decry the "softness" of the conventional articulations of straight baseline rules. REISMAN & WESTERMAN, *supra* note 2, at 189-90.

44. Indeed, most of the indeterminate standards are drawn from the text of the I.C.J.'s opinion in the Anglo-Norwegian Fisheries Case. *See* Fisheries Jurisdiction (U.K. v. Nor.), 1951 I.C.J. 116.

45. REISMAN & WESTERMAN, *supra* note 2, at 218-19, 226-28.

46. LOS Convention, *supra* note 10, arts. 286, 292, 297(1). The right of a state to exclude disputes concerning military activities and matters being dealt with by the U.N. Security Council accommodates a variety of misgivings about compulsory jurisdiction. *See id.* art. 298(1).

47. The authors express concern that the absence of a "predetermined hierarchy" among the available tribunals "often impedes the formation of precedent and doctrine." REISMAN & WESTERMAN, *supra* note 2, at 218. From that perspective, universal acceptance of the jurisdiction of only one standing tribunal such as the International Court of Justice might be preferable, but would probably have rendered very unlikely both the negotiation and widespread ratification of a Convention with compulsory dispute settlement obligations. The emerging jurisprudence of maritime boundaries between neighboring states to which different fora have contributed suggests that the authors' hope for a "consistent policy concerning the interpretation of Convention provisions among the various LOS tribunals" may be realistic. *Id.* at 218-19.

Convention are, at a minimum, bound to arbitrate basic law of the sea disputes at the request of any party to the dispute.[48]

For many states, the effects of the Convention on communication, resource, or environmental interests provide a significant incentive for ratification. A state's interest in building, and participating in the work of, new global institutions also encourages ratification. Even if some, perhaps many, governments would not otherwise embrace compulsory arbitration of law of the sea disputes, they may well accept compulsory arbitration in order to reap the benefits of the Convention as a whole.

Overall, the authors' discussion of third-party dispute settlement focuses on its utility rather than the means by which it can be institutionalized. In this case, however, ends and means are difficult to separate. Apart from widespread ratification of the 1982 Convention, it is difficult to imagine a practical means for achieving, in the foreseeable future, a universal compulsory third-party dispute settlement regime for basic law of the sea issues. Removing the obstacles to widespread ratification of the 1982 Convention[49] would contribute significantly to the goals identified in this book. Widespread ratification not only would result in a relatively stable and commonly accepted articulation of positive rules in the Convention's text,[50] but would launch a system of compulsory dispute settlement that could, over time, curtail the abuses and confusion inherent in unilateral claims and weak or diffuse responses.

III. Conclusion

Nationalism, more precisely the combination of xenophobia, pressure to eliminate foreign competition for wealth, and the political expedient of blaming foreigners for undesirable conditions, has proven a potent force in the law of the sea in this century. The result has been a massive expansion of coastal state control over the sea. Baselines played some role in this process almost from the start. Because of a reluctance to expand territorial sea claims or to make direct assertions of jurisdiction over the high seas, if only because either action might elicit stern responses from maritime powers, some coastal states preferred indirect means of achieving the same goals. Expanding baselines was one such option.

If one assumes that coastal appetites have been satisfied if not satiated by the recent consumption of large and often rich continental shelves and exclusive economic zones, then states may begin to focus more attention on protecting inclusive uses of the sea, especially communications uses. In that case, they will agree with the authors that, apart from a purely technical role

48. LOS Convention, *supra* note 10, art. 287.

49. This is generally understood to entail addressing the objections of a number of industrial states to the Convention's deep seabed mining regime.

50. This in itself could have a significant effect on the willingness of governments to take effective measures to oppose excessive claims.

in simplifying maritime limits, straight baselines are an anachronism at best and a threat to important interests at worst.

Yet there is little to suggest that the politics of the law of the sea, particularly the politics of national claims, is as rational as the authors' analysis. Keeping foreign warships far from shore seems to be good politics even if it is bad or indifferent defense policy. Expanding areas of coastal state navigation regulation for environmental reasons seems to be good politics even if it is bad or indifferent communications and environmental policy. If these kinds of politics persist, governments may continue to be tempted to draw baselines aggressively, if not "pathologically." Straight baselines do restrict navigation to some extent and, perhaps more to the point for the pressured politician, appear to restrict navigation more than they really do.

A more conservative and more determinate straight baseline regime could help to control these political pressures. Governments could achieve such a regime by developing new rules or by consistently interpreting existing rules. Unfortunately, prior to the appearance of this book a determinate straight baseline regime was not forthcoming. Governments seemed unprepared to expend sufficient resources either in negotiations or, in most instances, in their individual and collective responses to "pathological" baseline claims, notwithstanding protests that one suspects are sometimes delivered with a diplomatic wink.

Perhaps this book will make a difference. By pointing to the "pathological" uses of straight baselines, this book alerts all concerned parties that the current baseline regime may undermine common interests. The difficulty is that claimant states may continue to be reluctant to retreat for political reasons, while their opponents may be reluctant to expend sufficient political, economic, or other capital to induce a retreat. The solution to this problem does not concern only straight baselines. Therein lies the elusive solution to the instability of the law of the sea as a whole.